A

PP

v.

AG BAHRUN MAT YASSIN

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI J
[CRIMINAL APPEAL NO: K42-53-2011]
5 JANUARY 2012

C ***CRIMINAL PROCEDURE:*** *Trial - Failure to cross-examine prosecution witness - Accused acquitted and discharged - Appeal against decision of Sessions Court - Accused charged for raping his stepdaughter - Purpose of challenging witness's testimony - Whether prosecution witness's evidence implicated accused but no imputation in cross-*
D *examination that the evidence was not accepted - Whether evidence deemed accepted - Whether court could cast reasonable doubt on testimony of witness if it was not challenged in cross-examination - Wong Swee Chin v. PP*

E ***EVIDENCE:*** *Cross-examination - Defence failure to cross-examine prosecution witness - Accused acquitted and discharged - Appeal against decision of Sessions Court - Accused charged for raping his stepdaughter - Purpose of challenging witness's testimony - Whether prosecution witness's evidence implicated accused but no imputation in cross-*
F *examination that the evidence was not accepted - Whether evidence deemed accepted - Whether court could cast reasonable doubt on testimony of witness if it was not challenged in cross-examination - Wong Swee Chin v. PP*

EVIDENCE: *Witness - Cross-examination of prosecution witness - Failure*
G *of - Accused acquitted and discharged - Appeal against decision of Sessions Court - Accused charged for raping his stepdaughter - Purpose of challenging witness's testimony - Whether prosecution witness's evidence implicated accused but no imputation in cross-examination that the evidence was not accepted - Whether evidence deemed accepted - Whether court could cast*
H *reasonable doubt on testimony of witness if it was not challenged in cross-examination - Wong Swee Chin v. PP*

EVIDENCE: *Standard of proof - Beyond reasonable doubt - Accused acquitted and discharged - Appeal against decision of Sessions Court -*
I *Accused charged for raping his stepdaughter - Whether court could cast reasonable doubt on testimony of witness if it was not challenged in cross-*

examination - Whether trial judge's doubt predicated on accused's bare assertion - Whether a doubt based on conjecture constitutes a reasonable doubt

The respondent ('accused') was charged in the Sessions Court for raping his 15 year old stepdaughter ('PW2'), an offence punishable under s. 376B Penal Code. The prosecution's case was that the accused had sexual intercourse with PW2 and the latter did not tell anybody about the incident as the accused told her not to do so. Twenty days after the accused left the matrimonial home and having sensed that PW2 frequently received text messages from the accused, PW2's mother ('PW1') confronted her. Finally, PW2 confessed to her mother about the sexual act and PW1 then lodged a police report the same night. In his defence, the accused contended that the whole incident of rape was fabricated, and that PW1 and PW2 had conspired to fix him up so that he could be sent to jail since PW1 was angry that he had applied for divorce after she refused to allow him to take a second wife. The learned trial judge accepted the accused's defence which led him to doubt the truth of PW2's testimony. The main reason as to why the said trial judge had doubts about PW2's testimony was due to the fact that: (i) the police report was only lodged by PW1 after the accused left their matrimonial home and (ii) there was a pending divorce case between PW1 and the accused in the Syariah Court. Thus, the accused was acquitted and discharged as it was found that the accused succeeded in raising a reasonable doubt in the prosecution's case. Hence this appeal by the Public Prosecutor.

Held (setting aside order of acquittal and substituting it with an order of conviction):

(1) In our adversarial system of criminal justice, it is imperative that if the testimony of a witness is not accepted, his evidence must be challenged in cross-examination. The purpose of challenging the witness's testimony is to give him the opportunity to confirm, deny or qualify the suggestions. It will also give the trial judge the opportunity to observe the witness's demeanour when answering questions. (para 6)

(2) PW2's evidence gravely implicated the accused, yet there was no imputation in cross-examination that her evidence was not accepted. Crucially, it was not put to her that the sexual act did not take place at all. Hence, her evidence was deemed to be accepted. Further, it was never put to PW1

A in cross-examination that she lodged the rape report due to the divorce case. Since this is the main thrust of the defence case, failure to do so could only mean that it was an afterthought (*Wong Swee Chin v. PP*; refd). (paras 8 & 16)

B **(3)** Instead of confronting PW2's evidence head on, the accused chose to attack PW1 wherein he accused her of instigating PW2 to fabricate the evidence against him. It was an afterthought calculated to cast an imaginary doubt in the mind of the court. A defence based on an afterthought is C not a defence that could cast a reasonable doubt in the prosecution's case. (para 24)

(4) A reasonable doubt is a doubt that stands up to reason having regards to the totality of the evidence and the probabilities of the case. The doubt must be a real doubt D and is capable of dislodging the evidence led by the prosecution. A mere possible doubt is not sufficient. If the testimony of a witness had not been challenged in cross-examination, no reasonable doubt could be cast on the testimony of such witness by the mere fact that the accused E had a different story to tell. (para 18)

(5) The assertion that the accused had been framed by PW1 and that PW2 was merely parroting what PW1 instructed her to say was wholly untenable in the face of the F unchallenged evidence of PW1 and PW2. It was not even put to PW1 that she had instigated PW2 to make up stories against the accused. Neither had it been put to PW2 that what she told the court was what her mother told her to say. Further, her description of the sexual act was not the G sort of story that just any 15 year old girl could conjure up. (paras 19 & 20)

(6) Other than indirectly confirming that the sexual act did in fact take place, it was plain and obvious that the accused's allegation was based on pure suspicion. As for the reason H why PW1 would want to frame him up, it was likewise based on conjecture. A doubt based on conjecture could not constitute a reasonable doubt. (paras 22 & 23)

(6a) An accused person has no duty to prove or disprove I anything but the court must not entertain a doubt based on speculation or conjecture. The doubt must arise from actual evidence before the court or which can reasonably be

inferred from the surrounding circumstances of the case. The accused's explanation would reveal that his defence was a bare denial, which he spiced up with allegations of conspiracy against PW1. Since the accused's allegation of conspiracy against PW1 was not even put to her in cross-examination, his suggestion that she had instigated PW2 to fabricate evidence against him should not have been given any weight by the learned trial judge. (paras 23 & 24)

[The respondent/accused was sentenced to 12 years' imprisonment and three strokes of the rotan].

Case(s) referred to:
AEG Carapiet v. AY Derderian AIR [1961] Cal 359 ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 173(m)(iii)

For the appellant - Jamil Aripin DPP
For the respondent - Norbert Chin; M/s Norbert Chin & Co

Reported by Kumitha Abd Majid

JUDGMENT

Abdul Rahman Sebli J:

The Charge

[1] The respondent was charged in the Sessions Court at Kota Kinabalu with raping his stepdaughter and the charge against him is as follows:

> Bahawa kamu pada bulan Jun 2009 pada waktu pagi bertempat di dalam bilik di dalam sebuah rumah tidak bernombor, di Kampung Luagan Saginan dalam Daerah Beaufort, dalam Negeri Sabah telah merogol anak tiri kamu yang bernama XXX, P/15 Tahun 5 Bulan XXX B/Kadazan oleh itu kamu telah melakukan kesalahan yang boleh dihukum di bawah s. 376B Kanun Keseksaan.

[2] At the conclusion of the trial he was acquitted and discharged by the learned trial judge as he found that the respondent succeeded in raising a reasonable doubt in the prosecution's case, hence this appeal by the public prosecutor.

A

The Facts

[3] The prosecution's case is as follows. One morning in the month of June 2009, the victim (PW2), a Form 2 student and aged 15 years at the material time was alone with the respondent
B in the house when the respondent who was also her stepfather pulled her into the bedroom and asked her to take off her underwear, which she did. After she had taken off her underwear the respondent took off his own clothes and was completely naked. He then inserted his penis into PW2's private part and
C began to have sexual intercourse with her but before that he applied some brownish liquid on his weapon of offence. According to PW2 the sex act went on for quite a long time and when the respondent was done with he ejaculated on her stomach, which implies that she was lying on her back when the respondent was
D having sex with her. PW2 did not tell anybody about the incident as the respondent told her not to do so. She was also scared that the respondent would harm her physically if she did.

[4] However PW2's mother (PW1) sensed something fishy after
E noting that the respondent frequently sent text messages to PW2, even late into the night after he had left the matrimonial home. Then on the night of 22 July 2010 her suspicion was heightened when the respondent texted PW2 asking her "Cha kau sudah tidur kah?" She decided to confront PW2 and asked her if the
F respondent had done something wrong towards her. Her instinct proved right. PW2 confessed to the sex act. PW1 then lodged a police report the same night. In fact that was not the only time the respondent had sex with PW2. According to PW2 "terlalu banyak kali dia merogol saya" and that in a month he would rape
G her three to four times and sometimes five times and that the rapes took place in the living room, in her mother's room and on her bed.

[5] PW1's testimony is that she was at work when the offence was committed. It was the respondent who sent her to her place
H of work and that after sending her to work, he returned home. He stayed at home as he was unemployed. PW1 further testified that about three months after the police report was lodged the respondent contacted her by phone. He asked for forgiveness and persuaded her to come back to him but she refused.

I

Effect Of Failure To Cross-Examine

[6] In our adversarial system of criminal justice it is imperative that if the testimony of a witness is not accepted his evidence must be challenged in cross-examination. It is wrong to let his evidence pass by without challenge and then, when the witness has gone home, to contend that his evidence is untrue. The purpose of challenging the witness's testimony is to give him the opportunity to either confirm, deny or qualify the suggestions. It will also give the trial judge the opportunity to observe the witness's demeanour when answering the questions. The way he responds to the questions can sometimes be useful in assessing his trustworthiness as a witness.

[7] To constitute effective challenge, the questions must condescend on the disputed particulars of the witness's testimony and not merely by questioning him generally without imputing that the disputed part of his evidence is not accepted, and if the accused has a different version of the events, that version must be put to the witness. Failure to do so will render his version untenable if he gives evidence later in his defence.

[8] PW2's evidence gravely implicated the respondent, yet there was no imputation in cross-examination that her evidence was not accepted. Crucially, it was not put to her that the sexual act did not take place at all. Her evidence is therefore deemed to be accepted: see *Wong Swee Chin v. PP* [1980] 1 LNS 138 FC. On the same subject Mukharji J in *AEG Carapiet v. AY Derderian* AIR [1961] Cal 359 made the following pertinent observations:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at the trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. I has been stated on high authority of the House of Lords that this much counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asked no question with regard to this, then

A he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such
B subsequent testimony has no chance of being tested and corroborated.

[9] In fact by necessary implication, the respondent admitted to the sexual intercourse when he asked PW2 the following questions in cross-examination:

C

Q : Dia pancut air mani di tuala putih?

A : Dia pancut di perut dan lap dengan tuala putih.

Q : Dia pancut di tuala dan bukan di perut?

D

A : Tidak setuju.

[10] It does not matter if he ejaculated on the towel or on PW2's stomach. The fact is, he ejaculated and this could only be after having sexual intercourse with PW2.

E

Prima Facie Case Established

[11] At the close of the prosecution's case the learned trial judge found that a *prima facie* case had been established against the
F respondent and accordingly called for his defence. He made it clear in his grounds of judgment that he accepted PW2's evidence that the respondent did have sexual intercourse with her. Consent is irrelevant as PW2 was under the age of consent. It is a strict liability offence. The learned trial judge's finding on the reliability
G of PW2 as a witness is as follows:

> Although the prosecution's case rest solely on the evidence of the victim PW2, nevertheless it is my finding that I have no reason to disbelieve the evidence of the victim PW2 even though it was not corroborated. Thus after warning myself on the dangers of
H acting on the uncorroborated evidence of the victim, I conclude that it is safe to do so and hence called upon the accused to enter his defence.

The Defence Case

I **[12]** The procedure at the conclusion of the trial is prescribed by s. 173(m)(iii) of the Criminal Procedure Code ("the Code") which stipulates that if the court finds that the prosecution has not

proved its case beyond reasonable doubt it must record an order of acquittal. What it means is if, as a result of the defence explanation, the court is no longer sure of the truth of the prosecution's case, the accused must be acquitted.

[13] The respondent's explanation when called upon to state his defence was that the whole story of rape was a fabrication by PW1. It was his belief ("saya percaya") that PW2 was instigated by PW1 to implicate him with the crime. Simply put his defence was that mother and daughter conspired to fix him up so that he could be sent to jail, the motive being PW1 was angry that he had applied for divorce after she refused to allow him to take a second wife. The learned trial judge accepted the respondent's suggestion which consequently led to him to doubt the truth of PW2's testimony which he had accepted earlier. This is as good as finding that since PW1 had a grudge against the respondent, PW2's evidence could no longer be believed. The reason for this change of mind is reflected in the following passage in the judgment:

> Having now heard the evidence of the accused as well as the circumstances surrounding this instant case, *I find that I am left in doubt why this allegation of rape only surfaced after the accused left PW1's house and also because of an impending divorce case involving the accused and PW1 in the Syariah Court.* My doubt is further compounded by the fact that PW2 also said that she was raped in a Hotel in Kota Kinabalu when the family were in Kota Kinabalu. Although the incident in the hotel is not the subject matter of this charge, the fact that PW2 mentioned that she was raped in the said hotel where they were staying but could not recall anything creates a doubt in my mind and now ask myself whether in the circumstances it is safe for me to act on the uncorroborated evidence of PW2. (emphasis added)

[14] In the penultimate paragraph of his grounds of judgment the learned trial judge concluded as follows:

> Although I have no reason to disbelieve PW2, I now realize the dangers of acting on the uncorroborated evidence of PW2 in the light of the evidence given by the accused. The accused had given his version during the defence, though may not be the truth but his version had nonetheless raised doubts in my mind.

[15] It is clear that the main reason why the learned trial judge had second thoughts about the testimony of PW2 was due to the following two factors:

(1) The police report was only lodged by PW1 after the respondent had left the matrimonial home.

(2) There was a pending divorce case between PW1 and the respondent in the Syariah Court.

[16] There is in fact a simple explanation why PW1 only lodged the police report after the respondent left the matrimonial home. This is because she only came to know about the rape after PW2 confessed to her on the night of 22 July 2010, twenty days after the respondent left. As for the Syariah Court case it is presumptive to suggest that just because PW1 and the respondent had marital problems and were about to get a divorce PW1 must have instigated PW2 to fabricate evidence against the respondent. In the first place, it was never put to PW1 in cross-examination that she lodged the rape report due to the divorce case. Since this is the main thrust of the defence case, failure to do so can only mean that it is an afterthought.

Burden And Degree Of Proof

[17] In a criminal trial, unless the burden of proof on any element of the charge is reversed by operation of law, the burden throughout is on the prosecution to prove its case beyond reasonable doubt. It must be remembered however that the degree of proof is only proof beyond reasonable doubt, not proof beyond the shadow or flicker of a doubt. In this regard it is apt to refer to the judgment of Denning J in *Miller v. Minister of Pensions* [1947] 2 All ER 372 where the learned judge said at p. 373:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[18] Failure to appreciate the distinction can result in a serious miscarriage of justice in the sense that a guilty man may be acquitted. A reasonable doubt is a doubt that stands up to reason having regard to the totality of the evidence and the probabilities of the case. The doubt must be a real doubt and is capable of dislodging the evidence led by the prosecution. A mere possible doubt is not sufficient. If the testimony of a witness had not been challenged in cross-examination, no reasonable doubt could be cast on the testimony of such witness by the mere fact that the accused has a different story to tell.

Whether Doubt Reasonable

[19] What was the doubt that the learned trial judge entertained? It is obvious that it was a doubt predicated on the respondent's bare assertion that he had been framed by PW1 and that PW2 was merely parroting what PW1 instructed her to say. With due respect to the learned trial judge this assertion is wholly untenable in the face of the unchallenged evidence of PW1 and PW2. It was not even put to PW1 that she instigated PW2 to make up stories against the respondent. What was put to her in cross-examination was that she persuaded PW2 to tell her what happened between her and the respondent. This was how the cross-examination proceeded:

Setuju : Kamu pujuk anak kamu untuk memberitahu kamu tentang apa yang berlaku terhadapnya dan tertuduh, kerana kamu ada masalah keluarga.

A : Sanggupkah saya mahu menggadai maruah saya untuk kepentingan saya sendiri.

[20] Surely, to persuade one's own daughter to tell the truth cannot by any stretch of the imagination be equated with instigation to fabricate evidence. Neither had it been put to PW2 that what she told the court was what her mother told her to say. Further, her description of the sex act is not the sort of story that just any 15 year old girl could conjure up. What she described in court must have been her actual experience. Therefore the learned trial judge was wrong to have second thoughts about PW2's evidence based on the respondent's bare assertions.

[21] In his defence, the accused was asked to comment on PW2's evidence that he raped her and this was his answer:

> Saya percaya anak tiri saya didorong oleh ibunya. Tapi selama ini dia tidak pernah mengadu tentang kejadian rogol ini. Hanya selepas saya dan isteri saya sering bergaduh dan tidak sehaluan.

[22] Other than indirectly confirming that the sexual act did in fact take place, it is plain and obvious that his allegation was based on pure suspicion. As for the reason why PW1 would want to frame him up, it is likewise based on conjecture. This is what he said:

> Isteri saya sanggup buat laporan polis terhadap saya kerana saya rasa isteri saya tidak mahu saya berkahwin lagi dan supaya saya dipenjarakan.

[23] A doubt based on conjecture cannot constitute a reasonable doubt. It is true that an accused person has no duty to prove or to disprove anything but the court must not entertain a doubt based on speculation or conjecture. The doubt must arise from actual evidence before the court or which can reasonably be inferred from the surrounding circumstances of the case. Since the respondent's allegation of conspiracy against PW1 was not even put to her in cross-examination, his suggestion that she had instigated PW2 to fabricate evidence against him should not have been given any weight by the learned trial judge. If at all, the divorce case might provide motive for PW1 but not PW2. As mentioned earlier it was never put to PW2 in cross-examination that her evidence in court was at her mother's behest. Thus, even if the learned trial judge had doubts on the evidence of PW1 there was no reason for him to doubt the testimony of PW2. Clearly her evidence that the respondent did have sexual intercourse with her remains the truth as it was not challenged at all in cross-examination.

[24] A close look at the respondent's explanation will reveal that his defence is a bare denial, which he spiced up with allegations of conspiracy against PW1. Instead of confronting PW2's evidence head on, he chose to attack PW1 by accusing her of instigating PW2 to fabricate evidence against him. It is not difficult to conclude that this is an afterthought calculated to cast an imaginary doubt in the mind of the court. A defence based on an afterthought is not a defence that could cast a reasonable doubt in the prosecution's case.

Conclusion And Sentence

[25] For reasons aforesaid it is clear to me that the learned trial judge had erred in acquitting and discharging the respondent. Accordingly I set aside the order of acquittal and substituted it with an order of conviction. After hearing mitigation on behalf of the respondent and the submissions of the learned DPP I sentenced the respondent to 12 years imprisonment and three strokes of the rotan. What the respondent did was reprehensible. He took advantage of his underaged stepdaughter and would have continued to do so had it not been for PW1's uncompromising stand. He continued to send text messages to PW2 after leaving the matrimonial home, a clear sign that he had no intention to stop his amorous advances. This type of criminal conduct is all too common these days and the punishment provided by law does not seem to have the desired deterrent effect. The court must therefore send a clear signal to those who are similarly inclined that if they tempt fate and get caught they must expect very heavy sentences from the court.